Buffalo Law Review

Volume 36
Number 2 *Constitutional Law from a Critical Legal Perspective: A Symposium*

Article 3

4-1-1987

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The U.S. Constitution and the Intent of the Framers*

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ATTORNEY General Edwin Meese's call for a return to "original intention" in constitutional law has produced strong reactions from liberals such as Justice William Brennan. They see Meese's speeches as part of a concerted conservative effort to limit the role of the federal courts. Yet there is more to the controversy than simple political strategy. After all, by the end of his term Ronald Reagan will have appointed more than 50% of the sitting federal judges. And even if he makes no further appointments to the Supreme Court, the lower federal courts will be dominated by deeply conservative judges for many years. So conservatives have little reason to try to rein in federal judges by insisting on an "originalist" or any other approach to constitutional law. They have won in the political arena already, and the victory in staffing the federal bench is soon to follow.

Even more striking, Meese's jurisprudence of original intention has no significant support among people who have thought seriously about constitutional law. Some conservative lawyers and political scientists talk to each other about how important original intention is, but they have paid no attention to the withering critiques of their theory that others have developed. Justice Brennan has criticized the jurisprudence of original intent because it might stand in the way of achieving liberal goals. He would interpret the Constitution so that it advanced the cause of justice as he and other liberals understand it. Justice Brennan concludes that the framers were confused on some issues, that they often intended to leave issues open for later decision, or that their views are frequently irrelevant to today's problems. But the jurisprudence of original intent is wrong, not primarily because it produces results that are incompatible with the political preferences of today's liberals, but be-

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cause "original intention" just doesn't make any sense at all, and everyone who has thought about the question knows that.

Yet Meese's speeches strike a chord in our understanding of the Constitution, because they direct attention to our fear that judges, like other government officials, can do us serious harm. The dilemma is that Justice Brennan's confident liberalism, though it recognizes that governments and judges can do good, fails to express our concern that they do evil as well. Within the confines of contemporary views about government and law, we are bound to oscillate between believing that Meese is on to something and hoping that Brennan is correct too.

I

The Constitution's words do not define themselves. How do we know that holding a prayer breakfast at the White House, or opposing, on religious grounds, a woman's right to choose an abortion is not an "establishment of religion" prohibited by the First Amendment? Or that statutes requiring schools to have a moment of silence before classes might be establishment of religion?

The Constitution must be interpreted, and "original intention" is one method of interpretation. Others might be to do justice, or to enforce contemporary understandings of the Constitution's language. Meese believes that interpretation according to original intention is the best way of reconciling our commitment to limitations on government with our commitment to democracy. It is like enforcing a contract. When the framers created our government by writing the Constitution, they limited its powers in the same document. Courts can enforce the framers' agreement by figuring out what limits these men intended to place on the government they created. But, according to Meese, if courts go beyond the intent of the framers, the courts are assuming a power to restrict the elected branches of government that they were never given.

Some critics of "original intent" have challenged the contract analogy. Maybe the people who signed the Constitution agreed to be bound in specific ways, but they died a long time ago. Meese needs to explain why people today, who did not sign the "contract," should care one way or the other about the intentions of the people who did.

Meese's theory of constitutional interpretation can't stand up to even milder criticisms. We can begin with what has been called the problem of "interpretive intent." Meese wants to know how the framers intended that the courts interpret the Constitution. Did *they* think that it should be interpreted according to their intentions? If they did not,

Meese is caught in a contradiction. He wants courts to do what the framers intended, but the framers intended that the courts ignore their intentions. For example, the framers might have intended that later interpreters decide for themselves what the Constitution means. Their "interpretive intent" would direct today's judges to refrain from examining what the framers themselves would have thought about the proper interpretation of specific constitutional provisions.

A careful study by Jefferson Powell in the Harvard Law Review has shown that the framers did not hold Meese's jurisprudence of original intent. They thought instead that the meaning of the Constitution was clear to any person of common sense. The jurisprudence of original intention wasn't developed until around 1800, a decade after the Constitution was adopted, as a result of political disputes between Jeffersonians and Federalists. Unfortunately for Justice Brennan, however, the framers did not, in general, take the position that they wanted to leave things open for future development.

But suppose original intent is as close as we can come to the framers' interpretive intent. We would still have to figure out what their intent was. But we can't.

The first problem is deciding whose intentions count, and in what ways. The Constitution was written by a group of men who were intensely aware of the political dimensions of their actions. For example, they acknowledged sectional divisions over slavery and protected Southern interests to some extent, but they also refrained from using the word "slavery" in the Constitution to make it more acceptable in the North. Some of the framers, like Benjamin Franklin, opposed specific provisions but thought that the Constitution overall should be adopted. Others opposed the entire Constitution. During the debates, some framers gave their views on many of its provisions; others spoke only a few times. The Constitution was then submitted to the states, and much political discussion and pamphleteering ensued. Many people voted to oppose ratification. Whose views should we examine when we try to determine "original intention"?

Maybe the answer is that, like all historians, we do the best we can with whatever evidence we can come up with. We could apply some rules of thumb, giving more weight to what the influential James Madison said than to what more obscure participants said.

But that approach simply exposes another difficulty. Once we know *who* to count, we somehow have to add up the views of men who disagreed about many important matters. We might conclude, on balance,

that more of the people we count thought that it didn't violate the Establishment Clause for Congress to enter into a treaty with a Native American nation in which the United States agreed to pay the salary of a priest. (Congress did make such a treaty in 1803.) But we are sure to find some misgivings even about that. How can we figure out what "the framers" intended about the meaning of the Establishment Clause in situations that, unlike the 1803 treaty, don't involve war and peace or the territorial integrity of the nation?

The treaty example indicates a third problem with Meese's position. It's not easy to figure out what *any* framer's intention was about the issues that we face today. This problem has several facets. During the debates over the Fourteenth Amendment, some people said that, as they understood the amendment, it would prohibit school segregation; some of those people opposed the amendment for that reason, and others supported it for that reason. Still others disagreed with the suggested meaning, saying that the amendment would permit segregation. Others said that they hoped that the amendment would be interpreted to prohibit (or permit) segregation, but were afraid that it wouldn't be interpreted that way. Again, what is the framers' intention here?

The debate over the Fourteenth Amendment also demonstrates that much of what we know about the framers' views involves what they thought about particular issues: salaries for Christian ministers, a particular treaty, school segregation. But the questions presented to the courts today involve different issues. They may not involve subsidies to particular churches, but to all churches, or they may involve the national interest in remedial education, not territorial integrity. The most that we know is what the framers thought about specific problems. And somehow we have to infer from that what their views were, or would have been, about a different set of problems. Meese has not, and probably could not, explain why the inferences he wants to draw are more persuasive than the inferences that Justice Brennan would draw.

The problem of inferring intentions about novel cases is at the heart of Meese's criticism of some of the Court's recent church-state decisions, such as its holding that federal aid to parochial schools in poverty areas is unconstitutional. The prevailing view is that the framers were suspicious of government support of religion and accepted only modest invocations of religion in treaties like the 1803 one, which served overriding national interests. Justice Rehnquist has challenged this view, arguing that the framers accepted nondiscriminatory aid to religion. The problem is that the evidence we have is entirely consistent with *both* descrip-

tions of the framers' intent. Early Congresses provided aid to churches in Native American territory—nondiscriminatory, but also involving urgent issues of national security. They appointed congressional chaplains—again nondiscriminatory, but not terribly important to the overall operation of the government. So it doesn't help to say that, with respect to the issues presented to the courts today, we should pay attention to the framers' intent. Either we don't know what their intent was, or we have to choose between equally permissible inferences from what we do know about their intent.

There are a couple of ways to avoid this problem. One is that we may suppose that the framers actually intended to leave some questions open for future resolution by later legislatures or courts. However, those who have studied the question have rarely discovered an intention to leave hard questions to the courts.

The other way to avoid the problem is more important. We could distinguish between the framers' intent about specific practices like congressional chaplains, and their intent about the broader issue of the general relation between church and state. The framers' intentions were sometimes concrete, referring to particular issues that they had in mind, and sometimes abstract, referring to general principles that justified their views on particular issues. Of course, there are insoluble difficulties in adding up intentions when some were concrete and others were abstract. For example, James Madison and Thomas Jefferson had fairly elaborate theories about church-state relations, tending to support rather strong separation of church and state, while many of their colleagues reacted to particular issues like raising taxes to pay the salaries of ministers, or hiring a chaplain to open congressional sessions. It seems impossible to put together these different types of intentions.

Distinguishing between concrete and abstract intentions just reproduces the problem it was designed to avoid. The framers' concrete intentions were directed at the problems *they* faced; obviously they had no concrete intentions about *our* quite different problems. And their abstract intentions point in several directions when applied to today's issues. They had some sort of abstract intention about church-state relations, and about equality. But those intentions fit into a comprehensive world view. We would not be faithful to the framers' abstract intentions if we were to enforce their idea of equality without enforcing at the same time everything else that made up their world view. But the passage of time has made it impossible for us to share or enforce the framers' comprehensive world view.

Consider church-state relations. In 1789 the framers held two general views of the world. One can be called liberal or individualist. In this view, each person chose his or her values and then figured out what to do to achieve them. Government was supposed to take people's values as given and provide the framework within which people would promote their individual goals without interfering with each other. The second view was republican. It placed positive value on citizen participation in public life, and believed that government should act to make its citizens more responsible. People like Jefferson and Madison were influenced by both traditions. Sometimes they invoked one to explain why particular programs of government support of religion violated their fundamental understandings, and sometimes they invoked the other to explain why a different proposal was consistent with those understandings.

We have two difficulties in using the framers' world views as a guide to interpreting the Constitution. First, the framers were at least as much practical men of affairs as they were systematic political philosophers. It did not bother them that much of the logical implications of the liberal view—for example, that government should have nothing to do with the private sphere of religious belief—was inconsistent with the implications of the republican one—for example, that religious institutions should receive official support because they made citizens more responsible—so long as they could reach some decision on the particular problem they were facing. But the only way to move from the compromises they reached on their problems, to resolution of our problems, is to strike for ourselves the compromises that help us get on with the task of governing ourselves.

Second, and more important, the republican tradition is much less vital for us than it was for the framers. Republicanism was a political theory suitable for relatively stable societies pervaded by networks of people who met each other face-to-face over long periods to engage in all sorts of projects—economic, religious, political. Our society simply does not fit the conditions of republicanism very well. In part it has come not to fit because of the dynamics of economic development. The republican tradition understood that good societies rested on a base of independent property-holders, and the tradition understandably saw property-holding in its capitalist form. The republican tradition found itself yoked to a type of property whose dynamic transformed the society in ways that have now undermined the tradition itself. But that means that we can't enforce the framers' intent at all, unless we restore our society to the conditions of their society.

The social changes over the past two hundred years pose a final difficulty for the Meese theory of constitutional interpretation. Today our governments deal with many problems that were unknown to the framers, or whose dimensions have changed so much that it is misleading to think of the problems as the same in any useful sense. The framers of the Fourteenth Amendment did not know what nationwide, universal, compulsory public education was like. They may have had some "intentions" about the impact of that Amendment on the segregation of the very modest systems of selective and optional public education being operated in some states in 1868. But those intentions were directed toward institutions that share only the name "public school" with the institutions the Court dealt with in *Brown v. Board of Education* in 1954. As Chief Justice Warren said in this decision, which held segregated schools unconstitutional, "in approaching this problem, we cannot turn the clock back to 1868 . . . . We must consider public education in the light of its full development and its present place in American life throughout the Nation."

One solution to the problem that social change poses for a theory of original intention is to imagine resurrecting the framers, telling them all that has happened between 1789 or 1868 and today, describing the issue at hand, and asking them what they thought. Put aside the impossibility of performing the thought experiment, and consider this: If we resurrected Thomas Jefferson and brought him up to date on our problems, he'd be one of us. His intentions would be the intentions that we—or some of us—have. The jurisprudence of original intention projects the decisions we have to make back onto some revered figures in the past. But it remains a projection.

II

A classic Talmudic text tells this story: Rab Eliezer argued that the Torah could be interpreted directly, without paying attention to the intervening traditions of the oral law. One day he offered his interpretation of one passage, but the majority of the rabbis disagreed. R. Eliezer said, "if the Halachah agrees with me, let this carob tree prove it." Miraculously, the tree was torn from its roots and fell yards away. But the other rabbis said, "no proof can be brought from a carob tree." So R. Eliezer performed other miracles to confirm his interpretation. But the rabbis rejected them too. Finally R. Eliezer said, "if the Halachah agrees with me, let it be proved from Heaven!" And a Heavenly Voice cried out, "why do you disagree with R. Eliezer, seeing that in all matters the

Halachah agrees with him?" But Rab Joshua said, "it is not in Heaven," that is, the Torah had been given at Mount Sinai, and we pay no attention to a Heavenly Voice. The text concludes, "what did the Holy One, blessed be He, do in that hour? He laughed with joy, He replied, saying, 'My sons have defeated Me, My sons have defeated Me.' "

The Talmudic story makes a specific theological point—that "the framer" intended to give humans a certain kind of interpretive freedom. The theological conclusion is not directly applicable to problems of constitutional interpretation, for the framers' interpretive intention might have been to deny that freedom. But surely the story is suggestive about how people ought to treat authoritative texts.

III

Meese suggests that only a jurisprudence of original intention restrains the judges in just the way that we want them to be restrained. But that's wrong for two reasons. First, restraining the judges is not valuable in itself. The Constitution is not a populist document that confers all power on the people. Instead, it requires that the people and their representatives sometimes refrain from acting. The republican tradition was confident that the people would elect delegates who chose to honor the limits the Constitution places on government. But with the decline of that tradition, came the rise of judicial review as a back-up, to make sure that the elected branches adhered to the Constitution. We want to restrain the judges only insofar as they impose too many restraints on legislatures. But we can do that only by evaluating what the judges have done and then developing some ways to keep them, and the elected branches, within bounds.

The second reason that Meese is wrong is that he mistakenly thinks that the method of paying attention to original intent actually will restrain the judges. But the *method* has nothing to do with the *results* the Court reaches. Meese thinks that a jurisprudence of original intent shows that many of the Court's decisions in the past fifty years were wrong. But there is a conservative application of original intent—for example, that the framers of the Fourteenth Amendment did not intend to make school segregation unconstitutional—and a liberal application—for example, that those same framers had an abstract idea of equality with which school segregation is inconsistent. Because these alternative interpretations of the framers' intent are well-supported by the historical evidence, we can't say that results follow from the theory of original intent at all. What is at stake is picking the conservative or the liberal applica-

tion of the theory, and that choice can't be made by referring to original intent; we have to justify our choice on the basis of a political evaluation of the likely results.

Meese's political evaluation is obvious, but standing alone it is no more than that. With that in mind, we can understand the Meese-Brennan debate as a sort of shadow-boxing. It's really about results, but it purports to be about method. And what's curious is that it seems particularly pointless. Meese and his supporters think that it's important to persuade people to follow original intent, because that will produce the results they like. But the people they are trying to persuade include federal judges, and Meese is appointing them at a furious pace. It doesn't matter what theory of interpretation Reagan's judges have; we know what results they'll reach no matter what their theory is.

So why have the media paid so much attention to the Meese-Brennan debate? Partly, of course, it's politics. Brennan is a liberal and Meese is a conservative, and it hardly matters that their respective theories of constitutional interpretation have no necessary connection to their politics.

But I think there's more at stake. Think about what we can do with documents: We can write them, or we can read them. The jurisprudence of original intent says judges should not write the Constitution, but must only read it. An implicit image here is that writing is active and powerful, while reading is passive and responsive. Because writing is an active exercise of power, we are concerned when other people do it. Perhaps we would like to *be* writers, and therefore be powerful. But if we cannot be writers, we don't want anyone else to be either. Even more, we may find the imagery of passivity attractive, for activity (writing) may be frightening no matter who does it. Whatever the psychological sources of our fear of activity—whether we fear only other people, or are afraid of our own power—the political implications of the dichotomy between writing and reading are clear and direct: Anything other than reading and original intent is the assertion of judicial power.

Our earlier analysis of original intent shows that the implicit image of reading as passive is false; reading is a creative and powerful act too, as the reader chooses abstract and concrete intentions, alternative social visions imputed to the framers, and the like. But the effectiveness of the implicit association between reading and passivity, and between writing and power, is more important than its falseness.

We have a Constitution in the first place because we want to have a government that is powerful enough to do things that benefit us, but not

so powerful that it routinely hurts us. It's no secret that getting things to work out that way is not easy. Judicial review is one of the methods we've developed to mediate between the powers of government and the limitations we have placed on those powers. But the difficulties just recur. After all, judges are themselves part of government, and we want them to be powerful enough to limit the other branches, but not so powerful that they will keep us from making the political choices that we really want to make through democratic politics. Theories of judicial review, such as the jurisprudence of original intent, are attempts to mediate the conflict at this level. But we've seen that original intent doesn't do that, and neither could any other abstract theory of interpretation.

The jurisprudence of original intent is kept alive because we don't seem to have any good alternatives. Justice Brennan's position is that the judges should do justice. A society confident that people could discover indisputable standards of justice might find that position to be an acceptable mediation between judicial power and passivity. But that's not our society. Everybody knows that Justice Brennan's enduring principles of justice are his and his political allies', not some principles immanent in the natural order. When Meese says that his adversaries are defending unbridled judicial power, he's right. But the jurisprudence of original intent also defends unbridled judicial power.

Politics being what it is, progressives almost inevitably want to take sides in the Meese-Brennan debate. We don't need much sophisticated analysis to figure out whom we trust. But, as we have seen, there is an important sense in which Meese and Brennan are on the same side: the side that believes that the right *method* can reconcile power and limitations on the exercise of power. No method can do that. We simply have to live with the fact that the power that we hope will benefit us—whether it is the power of legislatures or the power of judges—might also hurt us, and do what we can to make it more likely that the people with power will help rather than hurt.